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No. 86-1085

In the Supreme Court of the United States

October Term, 1986

HERBERT PAGEL,

Petitioner,

v.

PEOPLE OF THE STATE OF CALIFORNIA,

Defendant.

REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

(APPELLATE DEPARTMENT OF THE SUPERIOR COURT, STATE OF CALIFORNIA, COUNTY OF LOS ANGELES, NO. CR A 23539)

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QUESTION PRESENTED

Do the restrictions on a prosecutor's use of peremptory challenges, recently established by this Honorable Court in *Batson v. Kentucky*, (1986) 476 U.S. ___, 90 L.Ed.2d 69, 106 S.Ct. 1712, also apply to defense counsel? This issue was specifically reserved in footnote 12 of the *Batson* opinion.

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INTRODUCTION

The petition here presents the issue reserved by footnote 12 of *Batson v. Kentucky, supra,* 476 U.S. ___, 90 L.Ed.2d 69, 106 S.Ct. 1712, i.e., whether the restrictions on a prosecutor's use of peremptory challenges also apply to defense counsel. Respondent's opposition to the petition discusses the merits of the above issue and presents two new arguments which this reply shall address pursuant to this Court's Rule 22.5. Respondent's new points are as follows:

1. "The constitutional issues raised in the Petition for Certiorari were neither presented nor addressed in the state courts" [Opp., pp. 3-5];

2. "Petitioner posed no constitutional objection to the makeup of the jury which heard the evidence and rendered the verdict" [Opp., pp. 5-6].

In effect, respondent contends the issue raised by the petition was not sufficiently preserved below. As discussed *infra*, respondent is wrong in several respects and, in addition, seeks an unfair benefit from the fact that *Batson* was not rendered until *after* trial in this matter and *after* the appeal had been fully briefed in the California appellate court. In fact, however, the issue presented here was properly presented to the California appellate court by references to federal constitutional and decisional authorities. Further, neither respondent nor the California appellate court made any reference to trial counsel's alleged failure to properly object at trial. Instead, the California appellate court decided the issue on its merits and even addressed the effect of *Batson*, after that decision had been called to its attention at oral argument.

In summary, it is now appropriate for this Honorable Court to address the issue reserved in *Batson*. The present case is an ideal vehicle for doing so.

LEGAL DISCUSSION

I.

PETITIONER RELIED ON FEDERAL CONSTITUTIONAL AND DECISIONAL AUTHORITIES IN THE CALIFORNIA APPELLATE COURT. CONVERSELY, NEITHER RESPONDENT NOR THE CALIFORNIA APPELLATE COURT RELIED ON PETITIONER'S FAILURE TO EXPRESSLY CITE SUCH AUTHORITIES IN THE TRIAL COURT.

In his Appellant's Opening Brief in the California appellate court, petitioner relied upon the Federal Constitution, including the Sixth Amendment, and upon various decisions of this Honorable Court, including *Peters v. Kiff* (1971) 407 U.S. 493, 500, and *Taylor v. Louisiana* (1975) 419 U.S. 522, 530, which discuss exclusion of classes of persons from jury service in terms of a defendant's rights only. (See App. Op. Br., pp. 1, 5, 10.)

At oral argument, petitioner's counsel again relied on such authorities and also called the court's attention to the then recent *Batson* decision, including footnote 12, which reserved the issue presented by the instant case.

The California appellate court discussed *Batson* in footnote 1 of its opinion. (See *People v. Pagel* (1986) 186 Cal.App.3d Supp. 1, 6, 232 Cal.Rptr. 104.) In the same footnote, the opinion also cited *Duncan v. Louisiana* (1968) 391 U.S. 145, 149, concerning the Sixth Amendment's application to the states through the Fourteenth Amendment.

Even respondent cited federal authority in its brief, i.e., *Booker v. Jabe* (6th Cir. 1985) 775 F.2d 762, 772, for the proposition that discrimination on the basis of

group affiliation in the use of peremptory challenges by either the prosecution or the defense should be improper. (Resp. Br., pp. 9-10.)

Furthermore, as discussed below in Argument II, the seminal California case, *People v. Wheeler* (1978) 22 Cal.3d 258, 148 Cal.Rptr. 890, 583 P.2d 748, relied extensively on federal authorities.

Finally, trial counsel here could not cite any United States Supreme Court authority on the present issue because such authority did not exist at that time. Trial was conducted in December 1984. *Batson* was not decided until April 30, 1986, well after trial *and* after all briefing had been submitted on the appeal.

Thus, petitioner clearly and adequately preserved the issue now presented to this Honorable Court.[1]

II.

THE SEMINAL CALIFORNIA CASE OF *PEOPLE v. WHEELER* RELIES EXTENSIVELY ON FEDERAL AUTHORITIES.

In *People v. Wheeler, supra,* 22 Cal.3d 258, 148 Cal.Rptr. 890, 583 P.2d 748, the California Supreme Court held that a prosecutor may not use peremptory challenges to strike jurors on the ground of group bias alone. The holding was based on both the Federal and California Constitutions. (See 22 Cal.3d at 265, 270.) *Wheeler* traced "a series of decisions beginning almost four decades ago [in which] the United States Supreme

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[1]Interestingly, *Batson* involved a much more incomplete preservation of the issue ultimately decided there than exists here. (See concurring opinion of Justice Stevens and dissenting opinion of Chief Justice Burger.)

Court has held that an essential prerequisite to an impartial jury is that it be drawn from 'a representative cross-section of the community.' " (22 Cal.3d at 266.) *Wheeler* proceeded to discuss the following United States Supreme Court decisions: *Smith v. Texas* (1940) 311 U.S. 128, 85 L.Ed. 84, 61 S.Ct. 164; *Glasser v. United States* (1942) 315 U.S. 60, 86 L.Ed. 680, 62 S.Ct. 457; *Thiel v. Southern Pacific Co.* (1946) 328 U.S. 217, 90 L.Ed. 1181, 66 S.Ct. 984; *Ballard v. United States* (1946) 329 U.S. 187, 91 L.Ed. 181, 67 S.Ct. 261; *Peters v. Kiff, supra,* 407 U.S. 493, 33 L.Ed.2d 83, 92 S.Ct. 2163; and *Taylor v. Louisiana, supra,* 419 U.S. 522, 42 L.Ed.2d 690, 95 S.Ct. 692. (See 22 Cal.3d at 267-270.)

Thus, if *Wheeler* is deemed to have decided the issue presented in this petition, it is clear it did so in substantial part on the basis of the Federal Constitution and United States Supreme Court decisions.[2]

Further, there can be no doubt that if this Honorable Court holds the Federal Constitution provides a defendant with the right to unrestricted use of peremptory challenges, neither California nor any other

[2]One of the issues litigated in the present case was whether footnote 29 of *Wheeler* constituted a holding that defense counsel are controlled by the same rule that *Wheeler* applied to prosecutors. If so, the lower California appellate court was bound to rule against petitioner here. (See *People v. Pagel, supra,* 186 Cal.App.3d Supp. 1, 7.) Petitioner argued the *Wheeler* footnote was dicta and relied upon a later decision, *People v. Trevino* (1985) 39 Cal.3d 667, 679, 217 Cal.Rptr. 652, 704 P.2d 719, in which the California Supreme Court stated: "In *Wheeler* we *suggested* that the People also have the right under the representative cross-section requirement to challenge the defendant's use of peremptory challenges. *That issue is not now before this court.*" (39 Cal.3d at 682, fn. 10; emphasis added.) The California appellate court held in its opinion here that the latter comment did not alter the "mandate" of *Wheeler*. (186 Cal.App.3d Supp. 1, 7, fn. 2.)

state may deny a defendant that right on the basis of its own constitution or decisional law.

Lastly, respondent notes that a state need not give parties a right to any peremptory challenges at all. (Opp., pp. 10-17.) This is true, but irrelevant. If the right is provided, it may not be qualified in derogation of the United States Constitution. (See, for example, *Griffin v. Illinois* (1956) 351 U.S. 12, 18, 76 S.Ct. 585, 590 ["It is true that a State is not required by the Federal Constitution to provide appellate courts or a right to appellate review at all . . . . But that is not to say that a State that does grant appellate review can do so in a way that discriminates against some convicted defendants . . . ."])

III.

PETITIONER WAS NOT REQUIRED TO MAKE A REDUNDANT AND FUTILE OBJECTION TO THE NEW JURY. IF THAT JURY WAS SELECTED UNDER INCORRECT RESTRICTIONS ON PETITIONER'S EXERCISE OF PEREMPTORY CHALLENGES, THE ERROR WAS PREJUDICIAL PER SE.

For the first time in this action, respondent argues petitioner should have lodged a formal objection to the new jury, after the first jury venire was quashed. [Opp., pp. 5-6.] Respondent presented no such argument in the California appellate court and, as noted above, the latter court did not rely on any such ground in reaching its decision. Therefore, this new contention by respondent should be disregarded.

Respondent also ignores [Opp., p. 6] both California and federal authorities that error in the jury selection process constitutes prejudice per se. (See *People v.*

Wheeler, supra, 22 Cal.3d at 283, citing *inter alia, Ballard v. U.S., supra,* 329 U.S. 187, 195, 91 L.Ed. 181, 186-187, 67 S.Ct. 261, 265; *People v. Turner* (1986) 42 Cal.3d 711, 728, citing *inter alia, Vasquez v. Hillery* (1986) ___ U.S. ___, 88 L.Ed.2d 598, 609, 106 S.Ct. 617, 623-624.)

IV.

THE ISSUE PRESENTED HERE IS CURRENT, IMPORTANT AND RIPE FOR ADJUDICATION.

In *Batson* this Court stated:

> "We express no views on whether the Constitution imposes any limit on the exercise of peremptory challenges by defense counsel." (476 U.S. at ___, fn. 12, 106 S.Ct. at 1718, fn. 12.)

The above issue was argued in the California appellate court, was discussed on its merits in that court's opinion, and is discussed at length in the present petition and opposition.[3] Thus, except in the trial court where proceedings were conducted long before *Batson*, the very same issue as presented here was expressly litigated at all times.

Moreover, it appears undisputed that the issue here is "important" within the meaning of Supreme Court Rule 17.1. Respondent merely argues this Court should let the issue fester for some indeterminate period in the lower courts. However, having spoken only last year on the prosecutorial half of this peremptory challenge issue, it is appropriate now for this Honorable Court

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[3]This Court's Rule 22.5 forbids any reply at this time to respondent's arguments on the merits, but petitioner most certainly will reply in the event briefs are permitted after certiorari is granted. (See Rule 25.2 and Rule 25.3.)

to speak on the defense half. Lower federal courts, state courts, prosecutors and defendants will all benefit from knowing — not guessing — the ultimate answer.

CONCLUSION

For the foregoing reasons, and for the reasons stated in the Petition for Writ of Certiorari, petitioner respectfully requests that this Honorable Court issue a writ of certiorari to review the issue reserved in *Batson*, i.e., whether the rule established there should be applied to defense counsel.

Respectfully submitted,

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PROOF OF SERVICE BY MAIL

State of California

ss.

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I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 11333 Iowa Avenue, Los Angeles, California 90025; that on April 9, 1987, I served the within *Reply to Opposition to Petition for Writ of Certiorari* in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

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I declare under penalty of perjury that the foregoing is true and correct. Executed on April 9, 1987, at Los Angeles, California.

Joy Rivelli Miller
(Original signed)